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In the Supreme Court of the United States

OCTOBER TERM, 1979

F. RAY MARSHALL, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

THE COUNTY OF LOS ANGELES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

F. RAY MARSHALL, SECRETARY OF LABOR, ET AL., PETITIONERS*

v.

THE COUNTY OF LOS ANGELES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether this suit, which seeks a declaratory judgment that the provisions of the Federal Unemployment Tax Act providing for the extension under state law of unemployment compensation coverage to state and local government employees (26 U.S.C. 3301 *et seq.*) violate the Tenth Amendment, and an injunction against the assessment and collection of federal unemployment taxes, is barred by the Declaratory Judgment Act (28 U.S.C. 2201–2202) and the Anti-Injunction Act (26 U.S.C. 7421(a)).

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* In addition to the Secretary of Labor, petitioners include the Secretary of the Treasury and the Commissioner of Internal Revenue. A list of the respondents has been lodged with the Clerk by petitioners in *The County of Los Angeles* v. *Marshall*, No. 79-1965.

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The Solicitor General, on behalf of the Secretary of Labor, the Secretary of the Treasury, and the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case, if the Court grants the petition for a writ of certiorari which respondents, the County of Los Angeles, *et al.*, filed in *The County of Los Angeles* v. *Marshall*, No. 79-1965.

OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. 32a-45a)[1] is reported at 442 F. Supp. 1186. The district court's order of dismissal (Pet. App. 29a-31a) is unreported. The opinion of the court of appeals (Pet. App. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980 (Pet. App. 7a). On June 4, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 3310 and 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.) and the Declaratory Judg-

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[1] "Pet. App." refers to the appendix to the petition in *The County of Los Angeles* v. *Marshall*, No. 79-1965.

ment Act (28 U.S.C. 2201-2202) are set forth in the Appendix, *infra*, 1a-3a.

STATEMENT

Respondents are seven states and approximately 1,750 political subdivisions. They brought this action in the United States District Court for the District of Columbia seeking a declaratory judgment that the Unemployment Compensation Amendments of 1976, which provide for the extension under state law of unemployment compensation to state and local government employees, are unconstitutional. These amendments provide for denial of tax credits against federal unemployment tax for private employers within a state which fails to extend unemployment compensation to its employees. Respondents also sought an injunction restraining the termination of tax credits for private employers and termination of federal grants that otherwise would result in states which refused to enact legislation conforming to the 1976 federal amendments (Pet. App. 32a-35a).

The statutory provisions at issue in this case operate as follows: Section 3304(a) requires the Secretary of Labor to approve any state unemployment compensation law which he finds conforms to the federal requirements set forth in that provision. Section 3304(c) requires the Secretary of Labor to certify to the Secretary of the Treasury each state whose law he has approved. This certification is to be made annually on October 31st. The certification of the Secretary of Labor is the prerequisite for tax credits for private employers subject to the state law and federal grants of money.

Section 3301 presently imposes a tax on most private employers equal to 3.4 % of the first $6,000 of wages paid to each employee.[2] In turn, Section 3302 permits the employer to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law.[3] This credit may not exceed 2.7% of such wages.[4] In Any calendar year, however, an employer may claim this credit only if the state's unemployment compensation law "is certified as provided in section 3304 * * *" (26 U.S.C. 3302(a)(1)).

If the Secretary does not make the required certification on October 31, private employers within the state become ineligible for the FUTA tax credits for that year. An uncertified state also loses two kinds of federal grants related to unemployment. The first type of grant is for the costs of administering the state's unemployment compensation program.[5] The second type of grant is for the administration of public employment offices, which provide, for example, job-finding, placement and recruiting services.[6]

Section 115 of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2670-2671, amended 26 U.S.C. 3304(a)(6) and 3309(a)(1)(B) (Pet. App. 50a-55a) to require, as a con-

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[2] See 26 U.S.C. 3301(1) and 3306(b)(1).

[3] 26 U.S.C. 3302(a)(1).

[4] See 26 U.S.C. 3302(a)(1),(c), and (d)(1).

[5] See Sections 301-303 of the Social Security Act, 42 U.S.C. 501-503.

[6] See Sections 1-12 of the Act of June 6, 1933, ch. 49, 48 Stat. 113-117, 29 U.S.C. 49-49k.

dition for certification, that state law provide unemployment compensation coverage for state and local government employees on the same terms and conditions as state law covers private employees. These amendments apply with respect to certifications of states for 1978 and thereafter, but only with respect to services performed after December 31, 1977. Section 115(d), 90 Stat. 2671.

The district court dismissed this suit for lack of jurisdiction (Pet. App. 29a-31a). It ruled that because the objective of respondents' action was to enjoin the denial of Federal Unemployment Tax credits to employers located in states whose unemployment compensation laws do not conform to the requirements of the 1976 amendments, the suit was barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. In its view, respondents did not demonstrate that they were likely to succeed on the merits or that they would sustain irreparable injury in the absence of an injunction (Pet. App. 35a-45a). The district court also observed that respondents had an adequate remedy at law. Pursuant to 26 U.S.C. 3310 (Appendix, *infra*, 1a-2a), any state that the Secretary of Labor determines not to be in conformity with the 1976 Amendments is entitled to seek judicial review of the Secretary's decision, and a stay of the Secretary's decision, in the court of appeals, and ultimately in this Court (Pet. App. 36a-37a).

The court of appeals affirmed per curiam the district court's dismissal of the complaint (Pet. App. 1a-6a). It did not, however, address the jurisdictional questions. Instead, it followed the decision of the First Circuit in

State of New Hampshire Dept. of Employment Security v. *Marshall*, 616 F.2d 240 (1980), appeal pending, No. 79-1846 (filed May 20, 1980), in which the State of New Hampshire advanced the same constitutional challenge to the 1976 Amendments to the Federal Unemployment Tax Act. As the court of appeals noted, "the First Circuit addressed the Tenth Amendment contention and concluded that it was unavailing. We agree with the constitutional determination so made by the First Circuit, and adopt its reasoning as fully applicable to the consolidated appeals before us" (Pet. App. 5a; footnote omitted). Like the First Circuit, the court of appeals held that *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), is distinguishable because conformity with the 1976 Amendments is "voluntary and wholly optional" (Pet. App. 6a).

REASONS FOR GRANTING THE PETITION

Respondents have filed a petition for a writ of certiorari in No. 79-1965, seeking review of the decision below holding that the 1976 Amendments to the Federal Unemployment Tax Act violate the Tenth Amendment rights of the states. We intend to oppose that petition. If that petition is granted, however, the Court should also grant the present petition in order to preserve the federal petitioners' right to defend the court of appeals' judgment on the basis of the alternative jurisdictional contentions not addressed by that court.[7]

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[7] Although it would appear that a cross-petition is not necessary in order to raise an argument which does not seek to alter

1. The Anti-Injunction Act, 26 U.S.C. 7421(a), generally, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." That statute bars this suit because respondents seek to restrain the government from denying FUTA tax credits to private employers for their contributions to state unemployment funds in states that fail to enact and retain unemployment compensation coverage for state and local government employees. In essence, therefore, this is a suit to restrain the assessment and collection of a tax. Further, the decisions of this Court establish beyond question that the constitutional nature of respondents' claim does not circumvent the bar of the Anti-Injunction Act. See *Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752, 759–760 (1974); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 11 (1974).

As this Court has held, the sole and exceedingly narrow exception to the Anti-Injunction Act is that an

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the judgment of the court of appeals, we are filing this conditional cross-petition out of an abundance of caution. *E.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); see *Langnes* v. *Green*, 282 U.S. 531 (1931). Cf. *Strunk* v. *United States*, 412 U.S. 434 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 & n.4 (1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Moreover, a cross-petition would not appear to be necessary where the objection to be raised is that the lower courts had no jurisdiction to consider the case. See *Peoria Ry.* v. *United States*, 263 U.S. 528, 535–536 (1924); *Mattingly* v. *N.W. Virginia R.R.*, 158 U.S. 53, 57 (1895). See also *Matson Nav. Co.* v. *United States*, 284 U.S. 352, 359 (1932); *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 125 (1804).

injunction may issue only when (a) "under the most liberal view of the law and the facts, the United States cannot establish its claim," and (b) irreparable injury will occur in the absence of an injunction. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 6-7 (1962), reaffirmed in *Bob Jones University* v. *Simon*, 416 U.S. 725, 742-746 (1974).

Respondents' suit fails both tests. This Court has ruled that federal grants and tax credits of the same character as those here are not coercive and do not intrude upon state sovereignty. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585-593 (1937); *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 525-526 (1937). Thus, it cannot be suggested that "under the most liberal view of the law," the government cannot succeed on the merits of its claim. Nor have respondents alleged the requisite irreparable injury—*viz.*, injury without adequate legal remedy. A suit for refund affords private employers a full opportunity to litigate the constitutionality of the tax. *Commissioner* v. *"Americans United" Inc.*, *supra*, 416 U.S. at 761-762. See, *e.g.*, *Steward Machine Co.*, *supra*.

Moreover, the affected states have an adequate remedy at law insofar as they are able to seek review of the Secretary of Labor's adverse determination. Congress has provided for judicial review of the Secretary's decision not to certify the laws of a state as conforming to the 1976 Amendments to the Federal Unemployment Tax Act. See Section 3310 of the Internal Revenue Code (Appendix, *infra*, 1a-2a), which provides for review by the appellate courts and this Court of any determination by the Secretary to

withhold a state's certification. Furthermore, Section 3310(d) explicitly states that the Secretary may not withhold certification until after exhaustion of the time to petition for review, and that the courts "may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights." Congress thus has established a method for judicial review specifically tailored to the question of state certification, which adequately protects the interests of the state. Indeed, in *State of New Hampshire, supra*, a state has advanced the identical constitutional challenge as respondents and the Secretary's 1978 decertification decision was stayed pending review by the court of appeals.[8] Respondents should not be able to bypass the established review procedures and then invoke the district court's general equity jurisdiction. The district court below correctly held that the Anti-Injunction Act bars this suit.

2. The district court also correctly held that this suit also is barred by the tax exception to the Declaratory Judgment Act (Appendix, *infra*, 3a). With one exception not pertinent here, that Act bars declaratory suits "with respect to Federal taxes." Respondents seek a declaratory judgment respecting the federal unemployment tax liability of private employers who are not even parties. As this Court has observed, the bar of the tax exception to the Declaratory Judgment Act

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[8] Of all the states, New Hampshire alone failed to enact legislation conforming its unemployment compensation law to the requirements of the 1976 Amendments.

against such suits is at least as broad as the Anti-Injunction Act. See *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 732-733 n.7.

CONCLUSION

The petition for a writ of certiorari should be granted if the Court grants the petition filed by respondents in No. 79-1965. If the Court denies that petition, it should also deny this petition.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 3310. JUDICIAL REVIEW.

(a) *In General.*—Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary of Labor. The Secretary of Labor thereupon shall file in the court the record of the proceedings on which he based his action as provided in section 2112 of title 28 of the United States Code.

(b) *Findings of Fact.*—The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary of Labor to take further evidence, and the Secretary of Labor may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) *Jurisdiction of Court; Review.*—The court shall have jurisdiction to affirm the action of the Secretary of Labor or to set it aside, in whole or in part. The judgment of the court shall be subject to

review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(d) *Stay of Secretary of Labor's Action.*—

(1) The Secretary of Labor shall not withhold any certification under section 3303(b) or section 3304(c) until the expiration of 60 days after the Governor of the State has been notified of the action referred to in subsection (a) or until the State has filed a petition for review of such action, whichever is earlier.

(2) The commencement of judicial proceedings under this section shall stay the Secretary of Labor's action for a period of 30 days, and the court may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights.

(e) *Preference.*—Any judicial proceedings under this section shall be entitled to, and, upon request of the Secretary of Labor or the State, shall receive a preference and shall be heard and determined as expeditiously as possible.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

28 U.S.C.:

SEC. 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SEC. 2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

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Petitioners,

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

AARON A. WILSON, *City Attorney*
28th Floor-City Hall
Kansas City, Missouri 64106

CONARD B. MATTOX, JR., *City Attorney*
300 City Hall
Richmond, Virginia 23219

T. EMMET WALSH, *City Attorney*
P.O. Box 5156
Spartanburg, South Carolina 29301

HENRY W. UNDERHILL, JR., *City Attorney*
600 East Trade Street
Charlotte, North Carolina 28202

(Names of counsel continued on inside of cover)

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

JOHN H. LARSON, *County Counsel*
648 Hall of Administration
Los Angeles, California 90012

R. GORDON KEAN, JR.
WILLIAM R. D'ARMOND
G. WILLIAM JARMAN
P.O. Box 1588
Baton Rouge, Louisiana 70821

DAVID V. ANTHONY
GREGORY A. SMITH
1828 L Street, N.W., Suite 405
Washington, D.C. 20036

ROBERT B. HANSEN, *Attorney General*
State Capitol
Salt Lake City, Utah 84114

CALVIN L. RAMPTON
800 Walker Bank Building
Salt Lake City, Utah 84111

CHARLES S. RHYNE
WILLIAM S. RHYNE
1000 Connecticut Avenue, N.W., Suite 800
Washington, D.C. 20036
466-5420

Counsel for the remainder of the some 1750 petitioners are listed on the caption to the complaint, lodged with the Clerk of this Court in No. 79-1965.

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Hon. F. RAY MARSHALL, Secretary of Labor of the United States, *et al.*,

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The COUNTY OF LOS ANGELES, California, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Number 80-72 presents what is in effect a cross-petition to review the judgment also presented for review in *County of Los Angeles* v. *Marshall,* No. 79-1965 (pet. for cert. filed June 14, 1980).

The Solicitor General, on behalf of the Secretary of Labor and other federal officials, seeks review of the rejection by the Court of Appeals of the jurisdictional defense of the Anti-Injunction Act, IRC §7421(a).[1] The Solicitor General, of course, must satisfy the requirements

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[1]Also involved is the co-extensive tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201.

implied in Rule 17, showing that the question is important and recurring.[2]

We agree that the question is important. It is our submission that the argument – implicit in the federal government's petition here – that hostage-taking statutory schemes such as the unemployment amendments at issue here will recur, constitutes the agreement of the federal parties that the petition on the constitutional merits in No. 79-1965 should be granted.

The most important and inconsistent fact which the Solicitor General's petition never faces up to is that while the FUTA, IRC § 3306(c)(7), exempts states and local governments from FUTA taxes, FUTA, IRC § 3309, then requires states and local governments to pay such amounts into the United States Treasury as will pay for unemployment compensation benefits to public sector employees at the same amount and under the same conditions and regulations as private sector employees receive, including "extended benefits", § 3304(a)(11) – with states and cities paying the entire cost of "extended benefits" for their employees and the federal government paying 50% of the cost of such extended benefits out of FUTA funds to private employees.

So in fact states and local governments are required by FUTA to pay more than private sector employers under the new FUTA scheme[3] of the amendments herein challenged.

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[2]As we point out in our petition for certiorari in No. 79-1965, Pet. 22, 34, there is no likelihood of a recurrence, or a division among the Courts of Appeals, under the unemployment law at issue here. Unless this Court grants certiorari in No. 79-1965 and declares the federal unemployment amendments unconstitutional, each state will have no effective choice but to conform to all future federal law requirements concerning unemployment benefits for public workers.

[3]Appendix A, *infra*.

The federal petitioners here seek to apply the Anti-Injunction and Declaratory Judgment Act provisions which apply only to federal taxes to the amount exacted from state and local tax-raised budgets by IRC § 3309 which applies only to states and local governments, but focus their petition upon the private sector tax credit scheme upheld in *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937). In this way they seek to avoid or conceal the coercive effect of the amendments and the federal FUTA tax taken out of state and local government tax budgets by the amendments of FUTA herein challenged. Petitioners admit these cost state and local governments at least $385 million per year with respondents' experts placing the amount at upwards of approximately $2 billion per year.

The petition also ignores the broad principles of Federalism which underlie *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) and says this is purely a Tenth Amendment case. The petition contends that when a state as a state is taxed under a federal statute, here FUTA, and must pay the taxes into the United States Treasury just as FUTA taxes are placed there from the private sector employers, this renders the amount thus taken not a tax so the doctrines of tax immunity, coercion under new facts involving a new statute not passed upon by *Steward,* discriminatorily forcing states to pay higher FUTA scheme costs than private sector employers by paying all the "extended benefit costs" of their former employees, must be overlooked in a case where respondents admittedly have a 1% unemployment rate for permanent employees and above all petitioner makes out no compelling national interest for overriding Federalism as for example in *Fry* v. *United States,* 421 U.S. 542 (1975).

The petitioner's reasons for not giving the amount from states and local governments exacted under the FUTA

amendments by applying that tax act to states and local governments is that it is clearly a federal tax and unconstitutional under *New York* v. *United States*, 326 U.S. 572 (1946), and *National League of Cities*, 426 U.S. at 843.

The "amount" is composed of state-local taxes raised by state-local governments, flowing as required by law into the federal treasury and then spent by the Congress under FUTA and the Social Security Act, 42 U.S.C. §§ 501 *et seq.* and 1101 *et seq.*

Petitioner's concentration upon the tax credit device of the private sector upheld in *Steward* and ignoring completely the tax on states and local governments is clearly prompted by the fact that this Court's jurisdiction to review and reverse such federal action has been asserted so often before and after *New York* v. *United States, supra.* Yet the entire purpose of Public Law No. 94-566 (1976) generally is to take an "amount" of tax funds from states and local governments in such sum as would pay in full the cost of public employee benefits under FUTA by linking it to the private sector scheme upheld in *Steward* and "unchanged"[4] from that day in 1935 when adopted until now. We submit that Public Law No. 94-566 is quite an enormous change as it imposes a tax upon states as states, and the extra charges for extended benefits, and involves facts and important intergovernmental constitutional power issues not before the *Steward* Court.

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[4]Petitioners rely upon *New Hampshire* v. *Marshall*, 616 F.2d 240 (1980), appeal pending, No. 79-1846, which repeatedly bases its decision upon the fact that the 1935 statute has been "unchanged" over the past 45 years. We submit the amendments here challenged as unconstitutional are indeed vast changes as well as changes effected by unconstitutional means.

The Solicitor General seeks by his petition to place the states in a position subordinate to private taxpayers. That, the federal Constitution does not do.

To bar consideration of the constitutionality of a tax exacted from states and local governments which is in effect, and certainly in result, a direct tax on state and local government tax revenues when in *Steward* a private taxpayer was held to have standing to raise the constitutionality of such a tax upon that private taxpayer is inconsistent with *Steward, New York* v. *United States, supra, National League of Cities* v. *Usery, supra,* and other cases holding states and their political units stand on a higher status than private taxpayers due to the higher status given to states under our constitutional Federalism, with over 100 references to the states as states in that Constitution as well as the Tenth Amendment.

The Solicitor General never faces up to this different status of the states in his petition which seeks to bar all court challenges to federal tax laws regardless of the facts as to the tax and the status of the parties involved.

1. Contrary to *Marbury* v. *Madison,* 1 Cranch. 137, 176-78 (1803), and progeny, the Solicitor General implies here that Congress, by successively enacting §§7421(a) and 3310 of the Internal Revenue Code, has divested this Court of jurisdiction to review the constitutionality, under *New York* v. *United States,* 326 U.S. 572 (1946) and *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), of federal legislation imposing a tax on state and local government personnel relations. The Solicitor General's assertion is unfounded. See *Lockerty* v. *Phillips,* 319 U.S. 182, 187 (1943).

The argument of the Solicitor General is that no court can review the constitutionality of a federal law require-

ment that federally tax-exempt entities tax themselves under state law, and pay tax into the federal treasury, unless these entities – here, state and local governments – refuse to accede to the federal requirement.

Then, the argument goes, a federal tax penalty,[5] exceeding the normal tax by 5 times, would accrue, but only against federal taxpayers. In that event, the Solicitor General argues, the private-sector employers on whom the penalty is imposed could follow the normal federal tax litigation paths. These private employers could assert vicariously the federalism-based rights of their state and local governments, in much the same way as was discredited in *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937), and *United States* v. *Darby,* 312 U.S. 100 (1941).[6]

On the record of this case, the several states would have to trigger a federal tax penalty of $11.5 billion on their private employers in order to litigate the constitutionality of the federally required public employer program.[7]

[5]In our view, a putative tax of 3.4% which has never been collected at a rate in excess of 0.7%, always since 1935 yielding a credit of 2.7%, consists of two components. The 0.7% actually, consistently and predictably received into the federal treasury is the normal tax. Denial of the federal tax credit would yield a 2.7% federal tax penalty.

[6]The exposure of private-sector employers to the federal tax penalty for the failure of government employers to pay state taxes would be the same under the jurisdictional alternative, recommended by the Solicitor General, of a petition under IRC §3310 to review an order of the Secretary of Labor decertifying a state's entire unemployment compensation law. See note 8, *infra.*

[7]When New Hampshire followed this suggestion, the federal government asserted different prudential and jurisdictional bars to avoid a decision on the constitutional merits. The majority of the panel of the Court of Appeals for the First Circuit rejected the assertion and decided the case on the merits. See Pet. App. 13a-14a, No. 79-1965; J.S.App. 6a-7a, No. 79-1846. Nonetheless, the Solicitor General has resurrected these defenses in seeking to avoid review by this Court in No. 79-1846, Motion to Dismiss 8 (Aug. 7, 1980).

This scenario — a state's exposing its private employers to a federal penalty in order to obtain a forum to litigate intergovernmental tax immunity — seems too harsh to induce belief that any state would refuse to conform to the federal requirement long enough to see the donouement. New Hampshire in the unemployment program at issue here was unable to see the game through to the end.[8] On the record of this case and of *New Hampshire,* No. 79-1846, there is no other remedy except through the jurisdiction which the District of Columbia Circuit Court found was present, notwithstanding IRC §7421(a). For, an alternate remedy must be practical and efficient, not merely available, if it is to foreclose review in other forums.[9]

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[8]See J.S. 19-20, No. 79-1846 (filed May 20, 1980). New Hampshire was coerced into attempting to settle its constitutional challenge to the federal unemployment law's public sector program requirements by the pattern of federal legislation. The Federal Unemployment Tax Act (FUTA) requires an annual certification by the Secretary of Labor that a particular state's unemployment law either does, or does not, meet each requirement set out in the FUTA and the other statutes incorporated by reference in the FUTA. IRC §3304(c). Certification is retroactive from October 31 to January 1. Federal law makes no provision for a prospective ruling from the Secretary; nor does federal law contemplate partially conforming state laws during the pendency of a challenge and review under IRC §3310. In the FUTA amendments at issue in both New Hampshire's appeal, No. 79-1846, and this case, No. 79-1965, the FUTA was amended to require changes in the private sector unemployment program of each state, as well as to require the enactment of a public sector unemployment program. In refusing to amend its law to conform to the public sector program requirements, New Hampshire necessarily also failed to conform to the private sector amendments (although New Hampshire makes no challenge to those private sector provisions either in this Court or in the Court of Appeals or before the Secretary below). This structural inhibition on any state's availing itself of the review provisions of IRC §3310 will be repeated each time Congress includes in the same amendments of the FUTA both public- and private-sector provisions.

[9]See, e.g., *Boyce's Executors* v. *Grundy,* 3 Pet. 210, 219 (1830).

The Solicitor General's argument that a jurisdictional alternative exists, when the record shows its practical unavailability, is an example of the sporting theory of constitutional adjudication. But, for the Solicitor General to seek review of the jurisdictional requirement that the sport be played, he must assert that there will be other federal requirements similar to the one whose merits is here for review.[10] That concession compels review on the merits in No. 79-1965.

2. The Solicitor General's petition in No. 80-72 is an admission that certiorari should be granted in No. 79-1965 in another sense as well. Ordinarily, federal jurisdiction would present a threshold question for this Court, even where, as here, the Court of Appeals below rejected the federal government's jurisdictional defense. However, under the Anti-Injunction Act — as the Solicitor General points out, Pet. for Cert. 6-7, No. 80-72 — the availability of an exception to the Anti-Injunction Act's bar cannot be determined without plenary consideration of the constitutional merits of the underlying challenge to the federal tax statute.[11] This is all the more true here where the federal statute imposes a tax on state and local governments. Moreover, a conclusion whether there is federal jurisdiction must therefore follow, rather than precede, resolution of the constitutional issue.

[10]We pointed out some pending, and possible, legislation using the hostage model in our petition, at pp. 33-35, in No. 79-1965.

[11]In asserting that the Anti-Injunction bars this action because the constitutional challenge lacks merit, the Solicitor General offers as his sole authority *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), and the companion case of *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495 (1937). Pet. for Cert. 7, No. 80-72. The Solicitor General thus joins issue on the constitutional merits as presented in No. 79-1965, see Pet. for Cert. 27, No. 79-1965, and admits the inseparable connection between jurisdiction and the constitutional merits.

3. Although the Anti-Injunction Act does not apply here because the federal taxing statute is unconstitutional,[12] if it were applicable, this case would present a conflict of decision with *Department of Employment* v. *United States,* 385 U.S. 355, 358 (1966), holding that the usual bar of the Johnson Tax Injunction Act, 28 U.S.C. §1341 (which, in restricting federal court injunctions against state tax collection, is the mirror-image of the Tax Anti-Injunction Act, IRC §7421(a), asserted here to bar federal court injunction of federal tax collection) would not apply to a suit challenging as unconstitutional a state unemployment payroll tax on a federal instrumentality.

CONCLUSION

The Solicitor General merely implied in his petition here that the hostage-taking scheme will recur, thus creating the possibility of future application of the Anti-Injunction Act against non-federal taxpayers subject to federally coerced state tax laws. The Court should defer a decision on certiorari in No. 80-72 pending an articulation by the Solicitor General how the application of the Anti-Injunction Act will recur.

In any event, the implication of its recurrence suggests that certiorari be granted in No.79-1965 to determine the

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[12] *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1962).

constitutionality of the far-reaching intergovernmental power issues the amendments herein raise.

Respectfully submitted,

AARON A. WILSON, *City Attorney*
28th Floor-City Hall
Kansas City, Missouri 64106

CONARD B. MATTOX, JR., *City Attorney*
300 City Hall
Richmond, Virginia 23219

T. EMMET WALSH, *City Attorney*
P.O. Box 5156
Spartanburg, South Carolina 29301

HENRY W. UNDERHILL, JR., *City Attorney*
600 East Trade Street
Charlotte, North Carolina 28202

JOHN H. LARSON, *County Counsel*
648 Hall of Administration
Los Angeles, California 90012

R. GORDON KEAN, JR.
WILLIAM R. D'ARMOND
G. WILLIAM JARMAN
P.O. Box 1588
Baton Rouge, Louisiana 70821

DAVID V. ANTHONY
GREGORY A. SMITH
1828 L Street, N.W., Suite 405
Washington, D.C. 20036

ROBERT B. HANSEN, *Attorney General*
State Capitol
Salt Lake City, Utah 84114

CALVIN L. RAMPTON
800 Walker Bank Building
Salt Lake City, Utah 84111

CHARLES S. RHYNE
WILLIAM S. RHYNE
1000 Connecticut Avenue, N.W, Suite 800
Washington, D.C. 20036
466-5420

APPENDIX A

STATUTORY PROVISIONS ALLEGED TO IMPOSE DISCRIMINATORY TREATMENT ON CONFORMING STATE AND LOCAL GOVERNMENT EMPLOYERS

The provision of the Federal Unemployment Tax Act requiring, as a condition of the conformance of State law to federal law, adherence to the rules governing the extended benefits program is, in the Internal Revenue Code:

> Sec. 3304. APPROVAL OF STATE LAWS
>
> (a) Requirements. – The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that –
>
> * * *
>
> (11) extended compensation shall be payable as provided by the Federal-State Extended Unemployment Compensation Act of 1970.

The provisions of the Federal-State Extended Unemployment Compensation Act of 1970, Pub.L.No. 91-373, Title II (Extended Compensation Act), codified at 26 U.S.C. §3304 note, establishing the requirements that state and local government employees be paid extended benefits, and the maximum amount of payment, are:

> Sec. 202. (a)(1) For purposes of section 3304(a)(11) of the Internal Revenue Code of 1954, a State law shall provide that payment of extended compensation shall be made, for any week of unemployment which begins in the individual's eligibility period, to individuals who have exhausted all rights to regular compensation under the State's law and who have no rights

to regular compensation with respect to such week under such law or any other State unemployment compensation law or to compensation under any other Federal law and are not receiving compensation with respect to such week under the unemployment compensation law of Canada. For purposes of the preceding sentence, an individual shall have exhausted his rights to regular compensation under a State law (A) when no payments of regular compensation can be made under such law because such individual has received all regular compensation available to him based on employment or wages during his base period, or (B) when his rights to such compensation have terminated by reason of the expiration of the benefit year with respect to which such rights existed.

* * *

(b)(1) The State law shall provide that the state will establish, for each eligible individual who files an application therefor, an extended compensation account with respect to such individual's benefit year. The amount established in such account should not be less than whichever of the following is the least:

(A) 50 per centum of the total amount of regular compensation (including dependents' allowances) payable to him during such benefit year under such law,

(B) thirteen times his average weekly benefit amount, or

(C) thirty-nine times his average weekly benefit amount, reduced by the regular com-

pensation paid (or deemed paid) to him during such benefit year under such law;

except that the amount so determined shall (if the State law so provides) be reduced by the aggregate amount of additional compensation paid (or deemed paid) to him under such law for prior weeks of unemployment in such benefit year which did not begin in an extended benefit period.

(2) For purposes of paragraph (1), an individual's weekly benefit amount for a week is the amount of regular compensation (including dependents' allowances) under the State law payable to such individual for such week for total unemployment.

The provisions of the Extended Compensation Act providing 50% federal funding for extended benefits in the private sector program, but denying this federal funding for employees of state and local governments (thus effectively requiring conforming state laws to tax governments more severely than private employers) are:

Sec. 204. (a)(1) There shall be paid to each State an amount equal to one half of the sum of—

(A) the sharable extended compensation, and

(B) the sharable regular compensation, paid to individuals under the State law.

* * *

(4) The amount which, but for this paragraph, would be payable under this subsection to any State in respect of any compensation paid to an individual whose base period wages include wages for services to which section 3306(c)(7) of

the Internal Revenue Code of 1954 applies shall be reduced by an amount which bears the same ratio to the amount which, but for this paragraph, would be payable under this subsection to such State in respect of such compensation as the amount of the base period wages attributable to such services bears to the total amount of the base period wages.

* * *

see 79

1965